IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JAIPUR BENCH, JAIPUR

O R D E R

D.B. CIVIL WRIT PETITION NO. 885/2001

Smt. Pushpalata Sharma w/o Shri Ravikant Sharma, r/o 414-A, New Railway Colony, Kota Junction presently posted as Chief Clerk (Adhoc) in the Office of Divisional Railway Manager, Western Railway, Kota

.....Petitioner

Versus

1. Union of India through the General Manager, Western Railway, Churchgate, Mumbai.
2. The Divisional Railway Manager, Western Railway, Kota Division, Kota
3. Shri Dinesh Srivastava, Chief Clerk in the office of Divisional Railway Manager, Western Railway, Kota

.....Respondents

4. The Central Administrative Tribunal, Jaipur Bench.

.....Proforma-respondent

Date of Order :: 6th September, 2007

PRESENT

HON'BLE MR. JUSTICE R.M. LODHA
HON'BLE MR. JUSTICE MAHESH CHANDRA SHARMA

Mr. R.N. Mathur for the petitioner
Mr. Chetan Bairwa for the respondents no. 1 and 2

ORAL ORDER (PER R.M. LODHA,J.):

The unsuccessful original applicant before the Central Administrative Tribunal has approached this Court by filing this writ petition.

2. The controversy centers around the inter-se seniority between the petitioner and the respondent no.3 on the post of senior clerk.

3. The facts in brief leading to the controversy may be noticed by us first.

4. The petitioner was appointed on the post of Junior Clerk by an order dated 19th January, 1981 in the pay scale of 260-400. Dinesh Srivastava-respondent no.3 herein is said to have been appointed as Junior Clerk vide order dated 22nd January, 1982. It is a common ground of the parties that from the post of Junior Clerk, further promotion is available to the post of Senior Clerk. Such promotion is given based on the suitability test.

5. That the suitability test for promotion to the post of senior clerk was held on 17th February, 1985 and 17th March,1985 is not in dispute. It is an admitted position that petitioner was not called upon to undergo the

suitability test though she fulfilled the eligibility while the respondent no.3 was called upon to take suitability test.

6. That the respondent no.3 was declared successful as per select list published on 29th April, 1985 for promotion to the post of Senior Clerk is not in dispute.

7. According to the petitioner, in the year 1987 another suitability test was held for promotion to the post of Senior Clerk but in the list-A of eligible candidates her name was not shown; rather her name was included in list-B, that was notified to remain in readiness for the purpose of calling in the suitability test in case the candidates in the main list did not appear in the suitability test or give their unwillingness.

8. Then again suitability test for promotion to the post of senior clerk was held on 29th March, 1989. That the petitioner was granted an opportunity to appear in the said suitability test is not in dispute. Her counsel submitted that it was not made clear that the opportunity to the petitioner to undergo suitability test held on 29th March, 1989 was in lieu of her claim to appear in the suitability test held in the year 1985 since

the petitioner was denied to take the suitability test in the year 1985 due to the administrative error. Be that as it may, the fact of the matter is that she made a representation on 27th March, 1989 seeking exemption from appearing in the suitability test. The exemption was sought by her on the ground that she has already cleared the process for direct recruitment to the post of Senior Clerk inter-alia from amongst service graduates quota held by the Railway Recruitment Board and her name was already empaneled for the post of Senior Clerk.

9. On 6th July, 1993, the petitioner was granted seniority above the respondent no.3. However, the said order was reconsidered on the representation made by the Union on behalf of the respondent no.3 and by the order dated 1st June, 1994, it was held that the petitioner cannot get the benefit of 1985 seniority above the respondent no.3 on the ground of administrative lapse and, consequently, the respondent no.3, in the seniority list of senior clerks, was restored seniority over the petitioner.

10. The order dated 1st June, 1994 was challenged by the petitioner before the Central

Administrative Tribunal by filing original application under Section 19 of Administrative Tribunals Act, 1985. The Central Administrative Tribunal by its order dated 12th January, 2001 dismissed the original application. This is how the matter has come before this Court at the instance of the petitioner.

11. The narration of facts afore-noticed would show that the petitioner was appointed as Junior Clerk earlier to the respondent no.3. On 17th February, 1985 and 17th March, 1985 when the suitability test for promotion to the post of Senior Clerk was held, admittedly, the petitioner was not called upon to take the said test due to administrative lapse. In the said suitability test which was held in the year 1985, the respondent no.3 appeared and he successfully qualified and was given promotion in the year 1985 itself. It is pertinent to notice here that, as per the petitioner's own case, in the year 1987, the suitability test for promotion to the post of Senior Clerk was held and for that two lists of candidates were notified. In list-A which was the main list of eligible candidates, the name of the petitioner was not included. In list-B, that was meant for the purpose of calling in the suitability test

in case the candidates from the list-A, or for some other reason, did not appear in the suitability test or give their unwillingness, the name of the petitioner was included but she never challenged the action of the respondents by not including her name in list-A. In the suitability test thereafter held on 29th March, 1989, the petitioner was called upon to appear but she did not appear. Instead she made a representation on 27th March, 1989 to exempt her from appearing in the suitability test since she had already cleared the selection process held by Railway Recruitment Board for direct recruitment to the post of Senior Clerk inter-alia from amongst the serving graduates quota.

12. The question that falls for our determination is: is the petitioner right in claiming seniority over the respondent no.3 in the list of senior clerks based on her selection by way of direct recruitment to the post of Senior Clerk on 10th March, 1989 from amongst serving graduate quota?

13. It is admitted position that promotion to the post of Senior Clerk is based on suitability test. Though there was administrative error in not calling the

petitioner to take the suitability test held on 17th February, 1985 and 17th March, 1985 yet the fact of the matter is that she never took any action for redressal of her grievance concerning the said administrative lapse. Not only that, according to the petitioner herself, in the year 1987, the suitability test was again held for promotion to the post of Senior Clerk and for the purpose of that test, the name of the petitioner was not included in the main list (list-A) while her name was included in residuary list (list-B); list-B was to remain in readiness for the purpose of calling in the suitability test in case the candidates from list-A for some reason or the other did not appear or they express their unwillingness. At no stage the petitioner called in question her non-inclusion in list-A notified for the purposes of suitability test held in the year 1987. It appears that the Department having come to know of the administrative lapse granted an opportunity to the petitioner to appear in the suitability test fixed for 29th March, 1989. The petitioner chose not to appear in the said test on a specious plea that she has been empaneled already and selected to the post of Senior Clerk through the selection

process conducted by Railway Recruitment Board by way of direct recruitment. How could the petitioner on the basis of her selection as direct recruitee on the post of senior clerk in the month of March, 1989 claim seniority over respondent no.3 who was promoted as senior clerk way back in the year 1985.

14. The counsel for the petitioner would urge that the examination conducted by the Railway Recruitment Board for selection to the post of Senior Clerk by way of direct recruitment inter-alia from amongst the service graduates quota was far more stringent and having cleared that, the request of the petitioner for exemption to appear in the suitability test held for promotion was extremely reasonable and ought to have been acceded to. We find it difficult to accept the submission of the counsel for the petitioner. If a particular mode is provided for promotion to a particular post, the candidate has to pass through that mode unless there is provision for exemption. The Central Administrative Tribunal in its order held that no provision was shown under which the petitioner could be exempted from the suitability test for the purpose of promotion which was founded on seniority-cum-

merit. No provision has been shown to us either. How could in the circumstances, the petitioner claim exemption from passing the suitability test on the ground that she has already been through the selection process for direct recruitment to the post of Senior Clerk held by Railway Recruitment Board. The whole contention is misconceived and fallacious. It is not the stringency of the test that is material, but what is material is the suitability test for promotion to the post of Senior Clerk which is distinct and different from the selection process held for direct recruitment to the post of Senior Clerk inter-alia from amongst the serving graduates quota. We are afraid on the basis of petitioner's selection to the post of senior clerk by way of direct recruitment from amongst service graduates quota in the month of March, 1989, the petitioner could not be accorded seniority over the respondent no.3 who was successful in suitability test based on seniority cum merit for promotion to the post of Senior Clerk way back in the month of April, 1985. There could have been some merit in the case of the petitioner had she appeared in the suitability test held on 29th March, 1989 and successfully

passed the said test and then claimed seniority over the respondent no.3 because in the year 1985 she was not called upon to take the suitability test due to administrative error. But she never chose to appear in the suitability test held on 29th March, 1989. Having not appeared in the suitability test held on 29th March, 1989 despite the opportunity having been given to her and there being no provision for exemption from the suitability test for the purpose of promotion to the post of Senior Clerk, we are afraid based on her selection by way of direct recruitment from amongst service graduates quota in the year 1989, she could not be held to have cleared the suitability test in the year 1985.

15. The counsel for the petitioner sought to place reliance upon rules governing promotion of subordinate staff, particularly Rule 219 that provides for automatic empanelment of staff in higher grade section and non selection posts, particularly clause (b) that provides that in the event of an intermediate grade being a non selection post, the employee would get a proforma position in the said intermediate grade only if such a

position was due in accordance with seniority/suitability being accepted by virtue of fitness for the higher grade by a process of selection. In the original application filed by the petitioner before the Central Administrative Tribunal, no case has been set up based on clause (b) of Rule 219. No such argument was raised before the Central Administrative Tribunal. Even in the entire writ petition no such plea has been raised. The counsel for the petitioner would submit that the argument being legal deserves to be allowed to be raised since such legal argument can be raised at any time. The contention that has not been set up in the original application nor canvassed during the course of arguments before the Tribunal nor raised in the writ petition does not deserve to be raised for the first time during the course of arguments.

16. Moreover, we find that clause (b) of Rule 219 does not improve the case of the petitioner. Rule 219 to the extent referred to by the counsel for the petitioner may be reproduced:

> "Automatic empanelment of staff in higher grade section and non-section posts
>
> (a) .....

> (b) Non-Section posts:-In the event of an intermediate grade being a non-section post, the employee would get a proforma position only if such a position was due in accordance with seniority/suitability being accepted by virtue of fitness for the higher grade by a process of selection."

17. By virtue of clause (b), the employee would get a proforma position in intermediate grade only if such a position was given in accordance with seniority/suitability being accepted by virtue of fitness for the higher grade by a process of selection. As noticed above, the petitioner never took suitability test for promotion to the post of senior clerk. Her selection by way of direct recruitment from amongst service graduate quota to the post of Senior Clerk would not give her seniority from the anterior date.

18. The counsel for the petitioner referred to the decision of the Supreme Court in the case of Anuradha Mukherjee (Smt.) and Others Versus Union of India & Others {(1996) 9 Supreme Court Cases 59}, particularly paragraph 12 which reads thus:

> "12.The inter se seniority of the candidates is regulated under para 302 of the Railway Establishment Manual (Vol. I —

Revised Edn., 1989) which reads as under:

> “302. Seniority in initial recruitment grades.--Unless specifically stated otherwise the seniority among the incumbents of a post in a grade is governed by the date of appointment to the grade. The grant of pay higher than the initial pay should not, as a rule, confer on railway servant seniority above those who are already appointed against regular posts. In categories of posts partially filled by direct recruitment and partially by promotion, the criterion for determination of seniority should be the date of regular promotion after the process in the case of promotee and the date of joining the working post after due process in the case of direct recruit, subject to maintenance of inter se seniority of promotees and direct recruits among themselves. When the dates of entry into a grade of promoted railway servants and direct recruits are the same, they should be put in alternate positions, the promotees being senior to the direct recruits, maintaining inter se seniority of each group.
>
> Note.-In case the training period of a direct recruit is curtailed in the exigencies of service, the date of joining the working post in case of such a direct recruitment shall be the date he would have normally come to a working post after completion of the prescribed period of training.”

19. In para 12, the Supreme Court noticed that inter-se seniority of the candidates in that case was regulated under para 302 of the Railway Establishment Manual (Volume I -- Revised Edition 1989).

20. The petitioner claims her promotion to the post of Senior Clerk from the date the respondent no.3 was promoted i.e. 10th April, 1985 though she was never promoted but selected by way of direct recruitment in the year 1989. Paragraph 302 of Railway Establishment Manual referred to in the case of Anuradha Mukherjee (Mrs.) does not help the case of the petitioner at all as noticed above where the petitioner was selected on the post of Senior Clerk in the year 1989 under the direct recruitment quota and she never took the suitability test for promotion despite the opportunity having been given to her.

21. The consideration of the matter by the Tribunal does not call for any interference.

22. Writ petition is, accordingly, dismissed with no order as to costs.

MAHESH CHANDRA SHARMA,J. R.M.LODHA,J.